IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 492 OF 2002

Deep Shankar Roy]
an adul, Occ: Business]
Residing at Bharat Tirtha]
Cooperative Housing Society,]..Appellant
Chembur, Mumbai 400 071](Ori.Deft.3)

versus

1. Mrs. Hansa V. Gandhi]
Indian Inhabitant, presently]
residing at 105, Lok Terrace,]
Sector - 17, Vashi, New Mumbai]
2. M/s. Chheda Land Developers]
Pvt. ltd. having its registered]
office at C-4 Big Splash,]
First floor, Turbhe Road,]
Sector - 17, Vashi,]
New Bombay 400 705]
3. National Estate Agency]
carrying on his business as]
Estate Agent and Builders]
their office at Chheda Crescent]
Building, Sector 17, Vashi]
Navi Mumbai]
4. Mr. Girish Vinodrai Gandhi]
an adult, Occ: Business,residing]
at 105, Lok Terrace, Sector 17]

Vashi, Navi Mumbai]..Respondents

WITH

FIRST APPEAL NO. 493 OF 2002

Dr. Rajeev M. Kaushik]
an adult, Occ: Doctor]
Residing at 1501, Sunrise Tower,]
Piramal Nagar, Goregaon (West)]..Appellant
Bombay](Ori.Deft.3)

versus

1. Mrs.Sheela Mahesh Gandhi]
Age 42 years, Adult, Indian]
Inhabitant, presently residing]
at 14, Suresh Vithal Niwas,]
Lakshmi Napoo Road, Matunga]
Central Railway, Bombay 400019]
2. M/s. Chheda Land Developers]
Pvt. Ltd. having its registered]
officer at C-4, Big Splash,]
First floor, Turbhe Road,]
Sector 17, Vashi, New Bombay]
400 705]
3. National Estate Agency,]
carrying on his business as]
Estate Agent and Builders, their]

office at Chheda Crescent Bldg.]
Sector 17, Vashi, Navi Mumbai]
4. Mr. Rashmi Vinodrai Gandhi]
an adult, Occ : Business]
Residing at 14, Suresh Vithal]
Niwas, Lakshmi Napoo Road,]
Matunga Central Railway]
Mumbai 400 019]..Respondents

WITH

FIRST APPEAL NO. 499 OF 2002

Ms. Priti Vipul Vira]
an adult, Occ : Business]
Residing at 70/71, Sarvodaya]
Building, 8/A Gokhale Road]..Appellant
(South), Dadar (W), Mumbai 28](Ori.Deft.3)

versus

1. Mr. Kantilal Manilal Gandhi]
Mr. Suresh Kandtilal Gandhi]
Indian Inhabitant, presently]
residing at 105, Lok Terrace]
Sector 17, Vashi, Navi Mumbai]
400 703]
2. M/s. Chheda Land Developers]
Pvt. Ltd. having its registered]
officer at C-4, Big Splash,]
First floor, Turbhe Road,]
Sector 17, Vashi, New Bombay]

400 705]
3. National Estate Agency,]
carrying on his business as]
Estate Agent and Builders, their]
office at Chheda Crescent Bldg.]
Sector 17, Vashi, Navi Mumbai]..Respondents

Mr. Jamshed Lentin i/b. Chandra Naik for the Appellants.
Mr. Jayesh Bhatt for the Respondent No.1.
Mr. Akhilesh S. Dubey i/b. M/s. M. Tripathi & Co. for the Respondent No.2.

CORAM : D. G. DESHPANDE,J.
DATE : 24TH AUGUST,2005

ORAL JUDGMENT :

1. All the three appeals have been filed by the original defendants against the three decrees of the City Civil Court in three different suits for specific performance of agreement granted in favour of the plaintiffs in those respective suits. Heard Counsel Mr. Jamshed Lentin who appeared for all the appellants and Counsel Mr. Jayesh Bhatt for the Respondent No.1 and Mr. Akhilesh S. Dubey for Respondent No.2 in all the appeals.

2. Common submissions were made by all of them regarding all the three appeals because common questions of law and fact arose. Therefore, this common order in all the three appeals. It may be stated here that the original defendant no.1 - developer is supporting the appellants and not the plaintiff.

3. I will refer to the parties by their respective title in the suits as plaintiff and defendants. Appellants are defendants. Respondent No.1 is a plaintiff and respondent No.2 is a developer, they are the main parties.

4. The plaintiffs filed their respective suits for specific performance against defendant No.1 i.e. Chheda Land Developers. It was the case of the plaintiff that the original defendant No.1 executed Letter of Intent dated 29.9.1992 reserving flat No. 1001 for a consideration of Rs.4,40,000/-. On that date the plaintiff had paid Rs.88,000/- as earnest money in respect of the flat and till January 1997 he has paid 10 instalments of Rs.22,000/- totalling Rs.3,08,000/-. However, according to the plaintiff on 26.7.1997 the defendant No.1 held meeting of the prospective flat purchasers and unilaterally and arbitrarily increased the price at Rs.250/- per sq. ft. and consequently increased the instalment from

Rs.22,000/- to Rs.38,500/-. According to the plaintiffs they never agreed for this escalation of price. The plaintiff had paid 11 instalments for which he had receipts regularly though there was no clause of escalation in the Letter of Intent. But when the defendant No.1 sent a letter to the Plaintiffs demanding enhanced price, the plaintiffs gave reply to the same through their Advocate vide reply dated 26.9.1997 denying all the contentions and refused to pay instalments. They alleged that the plaintiff has committed breach of the agreement, but that they were ready and willing to perform their part of the contract. In this background, three suits came to be filed by the plaintiffs.

5. Originally when the suit was filed the present appellants were not the parties. They were joined subsequently as by that time the original defendant No.1 had sold those respective flats to the appellants. The defendant No.1 denied claim and contention of the plaintiff. His contention was that some of the prospective purchasers of his scheme had filed a writ petition in the High Court as a result of which he could not carry out construction or could not proceed with his work. On account of this delay of about 2 years in execution of the work he was likely to face penalty at the instance of the Authorities. The prices in the

meantime of all the raw material had increased and therefore in this background a meeting was held on 26.7.1997 at his instance of all the flat purchasers for the purpose of escalation of the price. According to him the meeting was attended by the plaintiffs and the plaintiffs has signed the register in that regard. Further he contended that it was unilaterally decided that the builder should be permitted to raise the price in the aforesaid background and therefore accordingly the price was fixed at Rs.250/- per sq. ft. Letter to everybody in that regard was sent including the plaintiffs demanding enhanced instalment. That the majority of the purchasers of the flat or about 100 had paid the escalated price, but the plaintiffs refused to pay the escalated price, therefore their agreement was terminated by builder - defendant No.1. However, further through their Advocate’s letter dated 27.9.1997 informed the defendant no.1 that they were not ready to pay escalated price. The defendant No.1 gave reply to this letter on 19.12.1997 and it was pointed out to the plaintiffs that project was not feasible unless escalated price was paid and since the plaintiffs were not ready to pay the escalated price, their reservation of the flat which was made on the basis of the letter dated 19.9.1992 was cancelled and the plaintiffs were asked to come to the office of the defendant No.1 and take back

the amounts paid by them.

6. It was the further case of the defendant No.1 that since most of the purchasers had agreed for the escalation and since reservation in favour of the plaintiff was cancelled, those flats were required to be sold and therefore they were consequently sold to the present appellants who were then added by the plaintiff in the suit as defendants. According to the defendant No.1 therefore there is no breach of agreement. The price was escalated in the meeting attended to and approved by all the purchasers. Most of the purchasers had paid the escalated price, the plaintiffs were not ready to pay the escalated amount therefore their agreement was terminated by letter dated 19.12.1997 then after four months in April 1998 those flats were sold to the present appellants.

7. At this juncture, it is required to be mentioned that both the appellant and the defendant No.1 pointed out that even though the suits for specific performance were filed, no prayers for ad interim or interim injunction were made and the writ of summons came to be served upon the defendant No.1 only in June. Therefore, defendant No.1 was never

made aware of institution of the suit and therefore when he sold the flats to the present appellants, he was totally unaware of the suits filed by the plaintiffs.

8. So far as the appellants are concerned, it was their case mainly that they were bonafide purchasers for valuable consideration without notice and therefore in the circumstances the plaintiffs were not entitled to a decree for specific performance. The parties went on trial after the trail court framed necessary issues in the background of the pleadings and upon evidence the suit of the plaintiffs came to be decreed and therefore these three appeals by three purchasers of the flats.

9. The main contention of the appellants was that they were bonafide purchasers for valuable consideration without notice of the plaintiffs' rights in the property and therefore they are entitled for protection. Counsel for the appellants contended so far as the plaintiffs are concerned, firstly, there was no formal agreement between the plaintiffs and the defendant No.1, secondly the agreement was not registered and therefore even if the appellants had taken inspection of the record of the Sub Registrar, the appellants would not have

come to know of any such agreement between the plaintiff and the defendant No.1. The price paid by the appellants to the defendant no.1 of the flat was valuable consideration and there was nothing with the plaintiff to show that the purchase by the appellants of the respective flats was malafide. Counsel for the appellants also relied upon the judgment of the Supreme Court reported in **AIR 1999 SC 2028 Jagan Nath vs. Jagdish Rai and others.**

10. Counsel for the appellants drew my attention in this regard to paragraph 37 of the judgment wherein the court on this point of previous notice came to wrong conclusion. In this paragraph the trial Judge has stated:

> **" It is apparent from the record that the defendant No.3 had not taken such steps so as to ascertain whether there was any previous transaction with respect to the suit flat. Admittedly, he had not taken any search in that behalf. It is generally practice that when a person intends to purchase a flat for consideration of huge amount, he verified the relevant record and takes search thereof before entering into transaction. It is apparent from the record that the defendant No.3 had not taken such**

steps. On the contrary, I am of the view that the defendant No.3 was also having knowledge about the previous transaction with respect to the suit flat, but instead of that he had allegedly entered into a transaction with the defendant No.1. Therefore, defendant No.3 cannot take advantage of a phrase of bonafide purchaser without notice."

Counsel for the appellants contended that all these findings are absolutely wrong because if the agreement was not even in writing and not registered, there was no question of the appellants taking inspection of the record and there was nothing further on record to show the appellants had a knowledge of the previous transaction of the plaintiffs with the defendant No.1.

11. So far as this aspect of the matter is concerned, counsel for the plaintiff could not point out even single circumstances from which it could be inferred that the defendant No.3 - appellant had knowledge about the transaction of the plaintiff with the defendant No.1. Therefore, whole finding of the trial court on this important aspect is without any basis, contrary to the facts.

12. It is also a fact on record that when the appellant - defendant No.3 purchased the property the plaintiff was not in possession. If the plaintiff was in possession, then the appellant could be said to have notice of the right of the plaintiff but that was not so. Secondly, agreement of the plaintiff was not registered not even in writing and therefore it has to be held that the appellant was purchaser without notice and so far as the valuable consideration is concerned, he has paid valuable consideration and therefore he is also a bonafide purchaser because nothing to indicate the malafides on the part of the appellant is brought on record.

13. The situation that emerges from the proved facts so far as the plaintiffs are concerned, is as under:

1) That plaintiffs had with them a letter of intent executed by the defendant No.1 - developer and builder.

2) The plaintiffs agreed to purchase and the defendant No.1 agreed to sell certain flat to the plaintiff for a certain fixed price.

3) The plaintiffs paid earnest money

and also paid some subsequent instalments.

4) That there was no written regular agreement between the parties.

5) That the agreement was not registered with the Sub Registrar.

6) That the plaintiffs were not in possession of the flat.

7) In the absence of any such record nobody from the outside world was in a position to know about the agreement of the plaintiffs with the defendant No.1.

14. The facts that emerges in favour of the appellants are as under;

1) That the appellants were never aware of the agreement between the plaintiffs and the defendants No.1.

2) The appellants could not have with due diligence come to know about the agreement between the plaintiffs and the defendant No.1.

3) Even though the appellants had taken inspection of the record of the Sub Registrar the appellant could not have come to know about the agreement between the plaintiffs and the defendant No.1 because there was no formal written agreement and secondly the agreement was not at all registered.

4) That the plaintiffs were not in possession when the appellants entered into agreement with the defendant No.1 therefore the appellants had no source to know about the right of the plaintiffs in or over the said flat.

5) That appellants paid valuable consideration for the flat and were placed in possession by the builder.

15. So far as defendant No.1 is concerned, following facts are proved:

1) That defendant No.1 could not complete the project because of the orders in the writ petition.

2) That there was escalation in the price of the raw material.

3) That builder - developer - defendant No.1 held meeting of the prospective flat purchasers and it was attended by the plaintiffs.

4) That builder decided to enhance the price to which most of the flat purchasers agreed and they actually paid the price so escalated or raised and the plaintiffs did not agree for escalation and did not pay the enhanced price.

16. In this background of the matter, the dispute is whether the termination of agreement by the defendant No.1 with the plaintiff was proper.

17. There are two answers to these questions about the illegality of the termination. Firstly, if it is held that termination is proper than the plaintiffs loose all their rights in the property and the second answer is if the termination is illegal what is the position of the appellants who are bonafide purchasers for valuable consideration without notice.

18. Admittedly relief of specific performance is discretionary relief and therefore in the circumstances whether the trial court was justified in decreeing the suit of the plaintiffs as against the present appellants. The decree as such does not materially affect the defendant No.1 because now it is a dispute between the appellants and the original plaintiffs as to who should be clothed with the ownership rights of the property. In my opinion, if the dispute was merely between the plaintiffs and the defendant No.1 then the question whether termination was legal or illegal was of vital importance. But now when the appellants have stepped into the picture by virtue of their agreement with the developer - defendant no.1 and they are paying consideration to him and being placed in possession, the situation changes materially, and the only issue that remains is whether the bonafide purchaser for valuable consideration without notice i.e. the appellant should be protected as against the interest and claim of the plaintiffs. Counsel for the appellants relied upon the judgment of the Supreme Court reported in **AIR 1998 S.C. 2028 Jagan Nath vs. Jagdish Rai**. In that case the subsequent purchaser was defendant no.1. The suit property was mortgaged by the defendant no.1 in favour of one Rajinder Singh by a registered usufructuary mortgage deed

dated 26.7.1973 for a sum of Rs.5,000/-. Thereafter, the defendant No.1 entered into suit agreement in favour of the plaintiff agreeing to sell his property for Rs.60,000/-. The sale deed was to be executed in favour of the plaintiff by 30.12.1973. This time to execute the sale deed was extended by the defendant No.1 upto 30.6.1974. Then Defendant No.1 entered into sale deed of Rs.20,000/- in respct of the half of the suit property in favour of Jagir Singh son of Kapur Singh vide Sale deed dated 23.1.1974. It was in respect of half of the share of the defendant No.1 consisting of 7 marlas which was earlier mortgaged. In other words the sale deed was in respect of 1/4th share of the entire house. Then Jagir Singh sold his 1/4th share in favour of the defendant No.2. Remaining suit property was subsequently purchased by defendant no.2 from defendant No.1. The person who purchased the entire right, title and interest from defendant no.2 was thereafter treated as Defendant No.4. Question before the High Court was whether the defendant no.2 was a bonafide purchaser without notice and the High Court came to the conclusion that the defendant no.2 was a bonafide purchaser for value without notice and hence specific performance could not be granted against him. LPA was filed by the plaintiff but Division Bench did not interfere in the order and therefore the matter went to the

Supreme Court.

19. The question before the Supreme Court was whether the judgment of the Single Judge of the High Court and confirmed by the Division Bench in the LPA that the defendant no.2 was bonafide purchaser for value without notice is erroneous and liable to be set aside. In the background of these facts and circumstances and even though there were so many intervening transactions in respect of the property, the Supreme Court upheld the view of the High Court that defendant No.2 therefore is bonafide purchaser for value without notice of the suit agreement and therefore it was held that the plaintiff was not entitled to relief of specific performance as against the subsequent purchaser.

20. The facts in the present appeals are simple. The agreement of the plaintiffs with the defendant no.1 was not in writing. It was not registered. The plaintiffs were not placed in possession because possession constitutes notice to all. There is nothing on record brought out by the plaintiff to show that the appellants were or could have notice of their agreement. Therefore, it has to be held that the finding of the lower court in this regard are totally perverse and the appellants are bonafide purchasers for valuable consideration without notice

of the rights of the plaintiff in the suit property and as such on this ground alone the judgment of the trial court is liable to be set aside because in such a situation no decree for specific performance can be granted to the plaintiffs.

21. So far as termination of the agreement is concerned, it is clear cut case of the defendant no.1 that in the meeting held for escalation, the plaintiffs had attended the meeting and most of the flat purchasers agreed for escalation and they paid the escalated price whereas plaintiffs refused to pay escalated price. He, therefore terminated the agreement and asked the plaintiffs to take back their earnest money.

22. The plaintiffs then gave reply to this termination and filed a suit but did not serve the writ of summons or proceedings to defendant No.1 till the defendant no.1 executed respective agreements or sale deeds in favour of the appellants. If at all the suits were filed by the plaintiffs much earlier and immediately after the alleged termination, the plaintiffs ought to have moved the court for ad interim or interim order restraining the defendant no.1 from creating third party rights in respect of the respective flats. The plaintiffs did not choose to take out any

proceedings in that regard and remained contented by serving the writ of summons or notice of the proceedings upon the defendant No.1 only after summer vacation when in the meantime the defendant no.1 had already executed agreement with the appellants and placed them in possession after receiving consideration. Therefore when the conduct of the parties is required to be assessed while exercising discretion the plaintiffs conduct can not be said to be without blemish. They may have their own reasons for not agreeing for escalation but when the majority of the flat purchasers had agreed for escalation they ought to have followed . But if at all they wanted to challenge the termination they should not have remained contented by merely filing a suit in the Court of law but they should have taken out appropriate proceedings to restrain the defendant no.1 from creating third party rights but they did nothing of this sort and did not serve the proceedings upon the defendant no.1. This negligence coupled with the negligence in getting the agreement into writing and not getting the writing registered, are circumstances that go against the plaintiffs when they are compared with the conduct of the appellant, who have no role to play in termination, no motives are attributed to them, nothing is brought on record to show that there was collusion or that the appellants had

knowledge or notice of the plaintiffs transaction with the defendant No.1.

23. Therefore this is a case where the appellants are totally innocent purchasers who have parted with valuable consideration, they are bonafide purchasers without any notice of the plaintiffs right and in the circumstances the discretion exercised by the court in favour of the plaintiff is not proper and hence, the following order :

ORDER

. Appeals are allowed.

. Judgments and decrees of the trial court in favour of the original plaintiffs are set aside. The suits of the plaintiffs for specific performance are dismissed but the plaintiffs will be entitled to refund of the amounts paid by them from the defendant No.1 with interest at the rate of 9% per annum from the date of termination of agreement. If the plaintiffs have deposited the amount for payment to the defendant no.1, they will be entitled to get it back along with interest, if any, that might have accrued upon that amount if it is invested. In the circumstances, there will be no order as to costs.

24.8.2005 (D.G. DESHPANDE, J.)

. After this order was pronounced, counsel for the respondents prayed for staying the operation of the decree. The property has already been transferred to the appellants, therefore, there is no question of stay. However, for six weeks from today appellants will not create third party rights. Appellants will be entitled to get back the amount deposited with the Receiver.

. Prayer for any stay against the builder is rejected.

24.8.2005 (D.G.DESHPANDE, J.)